UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 640

Case No. 728: MOURAD

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Mohamed Jalal Mourad, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 30 April and 31 July 1993 the time-limit for the filing of an application to the Tribunal;

Whereas, on 3 May 1993, the Applicant filed an application requesting, inter alia:

"...

(a) That the Tribunal consider the amendment reflected in (P-5) Personnel Action No. E9W-495, issued on 10 September 1989 (...), as null and void, since it purported to implement unauthorized changes in the contractual relationship between the Administration and the Applicant...

(b) That the Tribunal consider the 'temporary repatriation' of the Applicant effective August 1990 as null and void...

(c) That the Tribunal consider the separation of the Applicant as having been based on an arbitrary and capricious decision...

...

(e) That the Tribunal order that the decision to separate the Applicant be rescinded and that he be reinstated in his previous post retroactively to the date of separation;

(f) Alternatively that adequate compensation be ordered for the injury sustained by the Applicant of not less than two years' net base salary, bearing in mind what the Administration would have had to pay as contribution to the Pension Fund for the period in question."

Whereas the Respondent filed his answer on 10 November 1993;

Whereas the Applicant filed written observations on 21 November 1993;

Whereas, on 7 December 1993, the Respondent submitted a document requested by the Applicant;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 1 August 1988, as an Economic Affairs Officer under a six-month fixed-term appointment at the P-4, step 1 level in the Natural Resources/Science and Technology Division of the Economic and Social Commission for Western Asia (ESCWA) in Baghdad, Iraq. Upon the recommendation of the Appointment and Promotion Board, and after approval by the Secretary-General, the Deputy Director, Recruitment and Placement Division, Office of Human Resources Management, by cable dated 9 March 1989, authorized ESCWA to offer the Applicant a two-year fixed-term appointment at the P-4, step 6 level.

A Personnel Action form was issued on 12 March 1989, by ESCWA, implementing an extension of the Applicant's appointment for two years, through 31 January 1991. The Applicant, on 12 March 1989, signed a letter of appointment for a fixed-term of two years, through January 1991. On 10 September 1989, ESCWA issued a new Personnel Action form, amending the Personnel Action form of 12 March 1989, "to reflect correct duration of appointment to read one year and six months", through 31 July 1990 and not 31 January 1991. The Applicant, on 21 September 1989, signed a new letter of appointment for a fixed-term of one and a half year, through 31 July

1990. The Applicant's appointment was then extended for a further fixed term period of one year, through 31 July 1991.

In a memorandum dated 12 June 1991, the Chief, Division of Administration, asked the Executive Secretary whether the Applicant's appointment should be extended beyond 31 July 1991. On 13 June, the Executive Secretary, in a handwritten answer, stated: "take necessary arrangements for no extension."

During the evacuation of ESCWA staff from Baghdad, as a result of the Persian Gulf crisis, the Applicant was repatriated to Damascus, in August 1990. He remained in Damascus until the expiration of his contract on 31 July 1991.

On 28 July 1991, UNDP Damascus was asked by the Acting Chief of Personnel, ESCWA, to inform the Applicant that he was not among the ESCWA international staff requested to report for duty in Amman since his fixed-term appointment expired on 31 July 1991.

On 7 August 1991, the Applicant requested the Secretary-General to review the administrative decision not to extend his appointment. Not having received a substantive reply, on 9 December 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 22 October 1992. The conclusions and recommendations of the majority of the Panel read as follows:

> "18. The majority of the Panel concluded that the decision not to renew the Appellant's contract did not violate his rights, including his right to due process.
>
> 19. The majority of the Panel also concluded that, under the terms and conditions of the Appellant's employment, he had no right to the renewal of his appointment and that he was not given any reasonable expectancy of continued employment by the Organization.
>
> 20. However, the majority of the Panel took into consideration the fact that other staff members serving in ESCWA who had their contracts extended, were authorized by ESCWA to go to Baghdad to retrieve their personal effects. The majority of the Panel, therefore, recommends that the Appellant be paid compensation, equal to his salary, covering the period from 1 August 1991 through the date of his return

to Syria from Baghdad, where he had gone to retrieve his personal effects, and that, in all other aspects, the appeal be rejected."

In a dissenting opinion, dated 19 October 1992, a member of the Panel concluded:

"...

8. In view of the series of inconsistencies and evasive replies [by the Administration], I cannot but conclude that indeed the Appellant had a legal expectancy of continuing service, that he did not receive the fullest regard for renewal of his fixed-term appointment beyond July 1991, and that, consequently, the decision to terminate him was vitiated by prejudice, improper motives and extraneous considerations."

On 23 November 1992, the Director of Personnel transmitted to the Applicant a copy of the Board's report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report, including the dissenting opinion. He concurs with the majority conclusion that you had no right to the renewal of your appointment and that you had not been given any reasonable expectancy of continued employment by the Organization.

Although, under your terms of appointment, your contract expired automatically and without prior notice on the expiration date specified in your letter of appointment, the Secretary-General finds that, under the exceptional circumstances of your case, you should have been informed in advance of the Administration's intention not to renew your contract. Accordingly, the Secretary-General has decided that you should be paid compensation in lieu of the one month notice period which would have been appropriate under the circumstances."

On 3 May 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent's decision to separate him was "arbitrary and capricious", and, therefore, he should be reinstated in his post, or paid adequate compensation.

2. The Applicant's second fixed-term appointment constituted an arbitrary substitute for the existing fixed-term appointment, which he had been given pursuant to a recommendation by the Appointment and Promotion Board and which had been approved by the Secretary-General.

3. A new staff member, especially in a regional office, should not have to suspect that a document he is asked to sign by the Respondent is invalid and would prejudice his entitlements and rights.

Whereas the Respondent's principal contentions are:

1. The Applicant had no legal expectancy to renewal of his fixed-term appointment.

2. The decision not to renew the Applicant's appointment was not vitiated by improper motives.

3. The Applicant has been granted adequate compensation for not being informed in advance of the non-renewal of his appointment.

The Tribunal, having deliberated from 24 June to 13 July 1994, now pronounces the following judgement:

I. The Tribunal must first examine the shortening of the original two-year fixed-term appointment, starting on 1 February 1989 and ending on 31 January 1991. The Respondent sought to curtail this apparent two-year appointment by six months.

II. There was an initial appointment for six months, starting on 1 August 1988 and expiring on 31 January 1989. A letter of 26 October 1988, from the Chief, Division of Administration, ESCWA,

Baghdad, to the Chairman of the Appointment and Promotion Committee, has as its subject "two years fixed-term appointment". The letter refers to eight applications for the post. In another letter of 1 February 1989, i.e. the day after the first contract had come to an end, the Chairman of the Appointment and Promotion Board recommended to the Appointment and Promotion Committee that the Applicant be given a two-year fixed-term appointment.

III. On 23 February 1989, the Appointment and Promotion Board recommended the Applicant for a two-year fixed-term appointment. The Personnel Action form, dated 12 March 1989, notes the effective date as 1 February 1989 and it mentions the extension of the fixed-term appointment for a two-year period. Nevertheless, another Personnel Action form, dated 10 September 1989, purports to amend the two-year period to one year and six months, leaving the effective starting date still as 1 February 1989.

IV. The Applicant asks that this amendment be found null and void since it sought to implement unauthorized changes in the contractual relationship between the parties. The Respondent says that the first appointment for a six-month period was made in anticipation of the expected approval by the Secretary-General of a two-year appointment, on the recommendation of the Appointment and Promotion bodies. When the approval was received, the Personnel Action form dated 12 March 1989, erroneously reflected, according to the Respondent, an extension of two years instead of eighteen months, which would have taken into account the six months already served. The Personnel Action form dated 10 September 1989, was a correction of this technical error. The Respondent also refers to the Applicant's signing the letter of appointment dated 21 September 1989, accepting a fixed-term contract of 18 months.

V. The Tribunal cannot accept the Respondent's explanation that it was initially intended that the first period of six months was to form part of a two-year appointment to have commenced on

1 August 1988. Nor can the Tribunal accept that the commencement date was to have been 1st February 1989 and that the appointment was to have been for eighteen months.

VI. If this were the case, the question must be raised as to why eight applicants were still being considered for the post in October 1988, after, according to the Respondent's argument, the term of the appointment had, in effect, already begun.

Moreover, if the appointment were to be taken as genuinely an eighteen-month appointment, it is strange that every letter and document, with the exception of the Personnel Action form dated 10 September 1989, mentions a two-year appointment in a context that can only reasonably be interpreted as referring to the future.

VII. The fact that the Applicant signed a letter of appointment referring to the eighteen-month extension is overwhelmed by an abundance of evidence which suggests that this shorter term was not initially intended. It is obvious to the Tribunal that the Applicant, as an employee, must have perceived himself to have been in the weaker position vis a vis his employer. Also, the Applicant must have harboured hopes for his future with the Organization. The Tribunal considers that the failure of the Applicant to register a complaint at that time does not bar him from making the claim now, in the context of his separation. The difference between an eighteen-month and a two-year fixed-term contract had no apparent consequence to him at the time of the extension. The harm occurred to the Applicant at the time of his separation. The Tribunal finds, therefore, that the claim is not time-barred.

VIII. The Administration subsequently granted the Applicant his final one-year appointment. As the preceding appointment properly expired on 31 January 1991, this new appointment should have begun on 1 February 1991. The Applicant should therefore have held a fixed-term appointment through 31 January 1992.

IX. The Applicant does not argue that he had a legal expectancy of re-appointment. He asserts, however, that his separation was based on an arbitrary and capricious decision and, contrary to the Respondent's contention, was not the result of a fair and objective reorganization dictated by the exigencies of the service. The Applicant also contends that where circumstances indicate that the Administration's decision was flawed, the onus shifts to the Administration to show that the decision was fully justified.

X. The Administration has explained that its non-extension of the Applicant's appointment was dictated by the re-orientation of ESCWA programmes in Science and Technology, according to the needs of the region. It maintains that the programme required the services of an engineer rather than those of a professional economist and that, in any case, a permanent staff member was available to provide the latter.

XI. However, the Chief of the Natural Resources Science and Technology Division, under whose supervision the Applicant had worked, was of the opinion that the Applicant could easily have been retained in his own post which was redeployed. He noted that the new job description stated that the qualifications required were those of a geologist or an economist and that the Applicant fit this description.

XII. While the Tribunal is not entirely convinced by the Administration's claim that the work required an engineer in the light of the qualifications listed in the job description, it does not find this a sufficient basis for concluding that the decision was flawed. It does not erode, much less negate, the Administration's position that the decision resulted from an assessment of what a fair and objective reorganization required.

XIII. Nevertheless, the wording of the job description was such that the Applicant could well have been left with the impression

that his prospects were good, although the Administration had already made its decision not to engage an economist. To leave him with such a misleading impression caused injury to him for which he deserves compensation. The Tribunal assesses this compensation at a figure equivalent to six months of his final net base salary.

XIV. The Tribunal notes the JAB's finding that the Applicant should receive reimbursement of expenses incurred for having had to go to Baghdad to retrieve his personal effects and is in agreement with this finding. This sum has already been paid.

XV. Finally, another element of compensation arises from the curtailment of the last six months of the Applicant's two-year appointment. For this, he is entitled to six months of his final net base salary.

XVI. For the foregoing reasons, the Tribunal orders the Respondent to pay to the Applicant a sum equivalent to 12 months of his net base salary at the rate in effect at the time of his separation from service.

XVII. The Tribunal rejects all other pleas.

(Signatures)

Samar SEN
President

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 13 July 1994

R. Maria VICIEN MILBURN
Executive Secretary